

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 227 (VEC)

5 SALVADOR DIAZ,

6 Defendant.

Conference

7 -----x
8 New York, N.Y.
9 February 20, 2019
3:35 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
Southern District of New York

16 BY: DANIEL G. NESSIM

ELINOR TARLOW

17 REBEKAH DONALESKI

Assistant United States Attorneys

18 SUSAN G. KELLMAN

19 Attorney for Defendant

20 Also Present:

21 Mark DeMarco

Steven Lynch

22 Carlos Santiago

1 (Case called)

2 MR. NESSIM: Good afternoon, your Honor, Daniel
3 Nessim, Elinor Tarlow, and Rebekah Donaleski for the
4 government.

5 THE COURT: Good afternoon.

6 MR. DeMARCO: Mark DeMarco Steven Lynch as standby
7 counsel for Salvador Diaz. Good afternoon, your Honor.

8 THE COURT: Good afternoon.

9 Good afternoon, Mr. Diaz.

10 THE DEFENDANT: Good afternoon.

11 THE COURT: After the last conference you may recall
12 that I asked Mr. Diaz does he still want to proceed pro se, and
13 he made it very clear that he did not want to proceed pro se,
14 but that he felt that he could not proceed with Mr. DeMarco as
15 his attorney, and, therefore, he was proceeding as we had been
16 proceeding, with him representing himself.

17 As a courtesy to Mr. Diaz I reached out to a new
18 attorney to see whether she would be willing to take on the
19 case and could do it going to trial on Monday. That's Susan
20 Kellman, who is here. Ms. Kellman has agreed to do that.

21 Mr. Diaz, here is the situation. I've got you an
22 attorney who does not have the baggage that Mr. DeMarco has.
23 Let me be very clear that I don't think Mr. DeMarco had a
24 conflict. I think he was providing you competent reputation.
25 We are going to have to agree to disagree on that.

1 The point is, I've got a new attorney for you if you
2 want to accept a new attorney to represent you during this
3 matter.

4 What would you like?

5 THE DEFENDANT: Can I have some time, a couple of
6 hours, with her, with my new attorney, just to discuss so I can
7 get a feeling -- basically, I'm trying to find out if I'm going
8 to have the same problems that I had with my previous
9 attorneys.

10 THE COURT: Some of the problems you will not have are
11 the following. The Court has ruled on the issue of whether you
12 can put at issue the validity of your underlying court marshal
13 conviction. That is law of the case. We are not revisiting
14 that. Whether Ms. Kellman represents you, whether Ms. Kellman
15 is standby counsel for you, or whatever, whatever situation we
16 have, that issue is not being revisited.

17 So the real issue is just the representation of you
18 for purposes of the trial. Given the charges that you are
19 facing, that defense is not going to be presented in this
20 courtroom.

21 Do you understand that?

22 THE DEFENDANT: I understand your position, but I
23 actually came prepared to rebut what you said before. If you
24 say you are not going to give me --

25 THE COURT: Mr. Diaz, as I told you last time, I am

1 the admiral of this ship. I have ruled. We are not going to
2 keep rearguing.

3 THE DEFENDANT: I understand that. But I understand I
4 also have the right to put my opinion on the record.

5 THE COURT: You do. And I will give you an
6 opportunity.

7 I am not revisiting my ruling. I have ruled. At the
8 end of this trial, if you are convicted, I may be persuaded to
9 let you make a record of what you would have proven had I
10 allowed you to put the defense on.

11 If you want an opportunity to meet Ms. Kellman, that's
12 fine. She is here. I am not going to give you a couple of
13 hours, but how about I give you 30 minutes?

14 THE DEFENDANT: Very well.

15 THE COURT: I'll be back up.

16 Hang out, Mr. DeMarco and Mr. Lynch. I'll be back at
17 4:00, so a little shy of half an hour.

18 (Recess)

19 THE COURT: Mr. Diaz, what is your pleasure?

20 THE DEFENDANT: Well, I present papers to her. She
21 said she is going to look it over, and then we will continue
22 with that, and she will be representing me then.

23 THE COURT: You do want to proceed with Ms. Kellman,
24 is that correct?

25 THE DEFENDANT: Yes.

1 THE COURT: Mr. DeMarco and Mr. Lynch, with the thanks
2 of the Court, you are relieved.

3 MR. DeMARCO: Thank you, your Honor.

4 MR. LYNCH: Thank you, your Honor.

5 THE COURT: Ms. Kellman, I am going to ask you to file
6 a notice of appearance in this case. You have asked to have
7 your mentee named as well. I'm happy to do that.

8 MS. KELLMAN: I can file a separate notice, your
9 Honor.

10 THE COURT: Yes, you should file a separate notice.

11 Just to catch you up on where we are, I will dutifully
12 amend the voir dire questions to reflect the fact that Mr. Diaz
13 is being represented, so he is no longer proceeding pro se, so
14 that will get adjusted accordingly. Obviously, Ms. Kellman.

15 I'm sorry. what is your name again?

16 MR. SANTIAGO: Carlos Santiago.

17 THE COURT: Your name will be on the voir dire
18 questions as well.

19 I think everything is on ECF. If not, we will send
20 you the voir dire questions.

21 MS. KELLMAN: If I can't find something, I will check
22 in with your clerk or the government.

23 THE COURT: We should have a charge out hopefully
24 tomorrow. The plan is to do a charge conference at the end of
25 the first day of trial, which will be Monday.

1 Mr. Diaz, you understand that now that you are
2 represented, you are represented. You can't keep going back
3 and forth between being represented and proceeding pro se.

4 You understand that?

5 THE DEFENDANT: I understand. I understood that in
6 the beginning, your Honor. I think I showed sufficient
7 evidence to show that I was not represented -- was not
8 afforded --

9 THE COURT: We are not going to argue that.

10 MS. KELLMAN: We have dealt with it.

11 THE COURT: It's done. The water is under the bridge
12 or over the dam.

13 One question that I had asked at the final pretrial
14 conference that I want to confirm, because you sort of all
15 looked like you weren't sure what the answer was.

16 Has a plea offer been made to Mr. Diaz?

17 MR. NESSIM: A plea offer has not been made. Mr. Diaz
18 has received a *Pimentel* letter.

19 THE COURT: Mr. Diaz is aware that he can plead
20 guilty. There is no offer on the table, but he understands
21 what the guidelines are if he chooses to plead guilty, correct?

22 MR. NESSIM: Yes, your Honor.

23 THE COURT: Mr. Diaz, have you received a letter from
24 the government that lays out what the guideline calculation
25 would be if you elected to plead guilty?

1 THE DEFENDANT: No, I have not.

2 THE COURT: We will make sure that you get that.

3 Could you please make sure to send it to Ms. Kellman
4 so that Mr. Diaz has it.

5 MR. NESSIM: Yes, your Honor.

6 THE COURT: Is there anything else that I need to do
7 before we adjourn to meet again at 9:45 on Monday morning?

8 MS. KELLMAN: Your Honor, we at this stage have no
9 discovery or 3500 material, but my understanding is that the
10 government is prepared to provide it to us forthwith.

11 THE COURT: Correct.

12 Mr. Diaz has it all, but they will provide it to you
13 as well.

14 MS. KELLMAN: Thank you. He didn't bring it.

15 THE COURT: Anything further from the government?

16 MR. NESSIM: No. Thank you, your Honor.

17 THE COURT: Anything further, Ms. Kellman?

18 MS. KELLMAN: No, your Honor.

19 THE COURT: Ms. Kellman, thank you for stepping in on
20 this short notice for a trial on Monday.

21 MS. KELLMAN: My pleasure, Judge. Glad I can help.

22 (Adjourned)

23

24

25